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U. S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

H₂

FILE:

Office: MANILA, PHILIPPINES

Date: **MAR 22 2010**

IN RE:

APPLICATION: Application for Waiver of Grounds of Inadmissibility under Section 212(h) of the
Immigration and Nationality Act, 8 U.S.C. § 1182(h)

ON BEHALF OF APPLICANT:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

A handwritten signature in black ink that reads "Michael Shumway".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The waiver application was denied by the Officer-in-Charge (OIC), Manila, Philippines. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed, and the application will be denied.

The applicant is a native and citizen of Fiji who was found to be inadmissible to the United States pursuant to section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(2)(A)(i)(I), for having been convicted of a crime involving moral turpitude. The applicant seeks a waiver of his ground of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h).

The OIC concluded that the applicant had failed to establish that his bar to admission would impose extreme hardship on his qualifying relatives, his U.S. citizen spouse and children, and denied the Application for Waiver of Grounds of Inadmissibility (Form I-601) accordingly.

On appeal, the applicant asserts that his court probation expires in March 2008. He states that he has not committed any crimes during the probationary period. He states that he is a responsible and contributing member of the community. He states that he loves his wife and children and wants to be with them. He states that his return to the United States will alleviate their extreme hardship. He contends that he does not want to raise his family in Fiji due to the country's political instability, economic deterioration and poor human rights record.

In support of the application, the record contains, but is not limited to, medical documentation, financial documentation, country condition reports, photographs, court records, and letters from the applicant, his spouse and children. The entire record was reviewed and considered in rendering a decision on the appeal.

Section 212(a)(2)(A) of the Act states, in pertinent parts:

(i) [A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime . . . is inadmissible.

(ii) Exception.—Clause (i)(I) shall not apply to an alien who committed only one crime if-

(I) the crime was committed when the alien was under 18 years of age, and the crime was committed (and the alien was released from any confinement to a prison or correctional institution imposed for the crime) more than 5 years before the date of the application for a visa or other documentation and the date of application for admission to the United States, or

(II) the maximum penalty possible for the crime of which the alien was convicted (or which the alien admits having committed or of which the acts that the alien admits having committed constituted the essential elements) did not exceed imprisonment for one year and, if the alien was convicted of such crime, the alien was not sentenced to a term of imprisonment in excess of 6 months (regardless of the extent to which the sentence was ultimately executed).

The Board of Immigration Appeals (BIA) held in *Matter of Perez-Contreras*, 20 I&N Dec. 615, 617-18 (BIA 1992), that:

[M]oral turpitude is a nebulous concept, which refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general....

In determining whether a crime involves moral turpitude, we consider whether the act is accompanied by a vicious motive or corrupt mind. Where knowing or intentional conduct is an element of an offense, we have found moral turpitude to be present. However, where the required mens rea may not be determined from the statute, moral turpitude does not inhere.

(Citations omitted.)

The record shows that the applicant was charged with committing on or about February 12, 2003: (1) corporal injury to a spouse/cohabitant/child's parent, (2) criminal threats, and (3) disobeying a domestic relations court order. The applicant, who was born on November 8, 1975, was 27 years old at the time he committed the crimes that resulted in his arrest.

The record reflects that on July 23, 2003, in the Superior Court of California, County of Alameda, the applicant was convicted of willful infliction of corporal injury on his spouse in violation of section 273.5(a) of the California Penal Code (Cal. Penal Code) and sentenced to a period of probation for five years under the condition that he serve 126 days in Alameda County Jail and pay designated fines

According to section 273.5(a) of the California Penal Code, a person convicted under the statute "shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment." Because the offense can result in a range of punishments, it is referred to as a "wobbler" statute, providing for either a misdemeanor or a felony conviction. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). The court disposition in the present case states that the applicant was convicted of a felony violation of Cal. Penal Code § 273.5(a). A felony is a crime which is punishable with death or by imprisonment in the state prison. Cal. Penal Code § 17(a). Accordingly, the maximum penalty possible for the applicant's offense was imprisonment in the state prison for four years.

The Ninth Circuit Court of Appeals has held that a conviction under Cal. Penal Code § 273.5(a) is categorically a crime involving moral turpitude. In *Grageda v. INS*, the Ninth Circuit held, “Because spousal abuse is an act of baseness or depravity contrary to accepted moral standards, and willfulness is one of its elements . . . spousal abuse under section 273.5(a) is a crime of moral turpitude.” 12 F.3d 919, 922 (9th Cir. 1993); *See Guerrero de Nodahl v. INS*, 407 F.2d 1405, 1406-07 (9th Cir. 1969) (stating, “we rule that inflicting ‘cruel or inhuman corporal punishment or injury’ upon a child is so offensive to American ethics that the fact that it was done purposely or willingly (the California definition of ‘willful’) ends debate on whether moral turpitude was involved. When the crime is this heinous, willful conduct and moral turpitude are synonymous terms.”). The AAO finds that the applicant’s conviction for a crime involving moral turpitude renders him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The applicant does not contest this determination on appeal.

Section 212(h) of the Act provides, in pertinent part:

(h) The Attorney General [Secretary of Homeland Security] may, in his discretion, waive the application of subparagraph (A)(i)(I), (B), . . . of subsection (a)(2) . . . if –

....

(B) in the case of an immigrant who is the spouse, parent, son, or daughter of a citizen of the United States or an alien lawfully admitted for permanent residence if it is established to the satisfaction of the Attorney General [Secretary] that the alien's denial of admission would result in extreme hardship to the United States citizen or lawfully resident spouse, parent, son, or daughter of such alien

The AAO notes that section 212(h) of the Act provides that a waiver of inadmissibility is dependent first upon a showing that the bar to admission imposes an extreme hardship on a qualifying family member. In this case, the relatives that qualify are the applicant’s U.S. citizen spouse and children. Hardship to the applicant himself is not relevant under the statute and will be considered only insofar as it results in hardship to a qualifying relative. If extreme hardship is established, the Secretary then assesses whether an exercise of discretion is warranted.

In *Matter of Cervantes-Gonzalez*, 22 I&N Dec. 560, 565-66 (BIA 1999), the BIA provided a list of factors it deemed relevant in determining whether an alien has established extreme hardship to a qualifying relative. The factors include the presence of a lawful permanent resident or United States citizen spouse or parent in this country; the qualifying relative’s family ties outside the United States; the conditions in the country or countries to which the qualifying relative would relocate and the extent of the qualifying relative’s ties in such countries; the financial impact of departure from this country; and significant conditions of health, particularly when tied to an unavailability of suitable medical care in the country to which the qualifying relative would relocate. The BIA added that not all of the foregoing factors need be analyzed in any given case and emphasized that the list of factors was not an exclusive list. *See id.*

Relevant factors, though not extreme in themselves, must be considered in the aggregate in determining whether extreme hardship exists. In each case, the trier of fact must consider the entire range of factors concerning hardship in their totality and determine whether the combination of hardships takes the case beyond those hardships ordinarily associated with deportation. *Matter of O-J-O-*, 21 I&N Dec. 381, 383 (BIA 1996). (Citations omitted).

The AAO notes that U.S. court decisions have repeatedly held that the common results of deportation or exclusion are insufficient to prove extreme hardship. See *Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). For example, in *Matter of Pilch*, 21 I&N Dec. 627 (BIA 1996), the BIA held that emotional hardship caused by severing family and community ties is a common result of deportation and does not constitute extreme hardship. In *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), the Court defined “extreme hardship” as hardship that was unusual or beyond that which would normally be expected upon deportation. The Court emphasized that the common results of deportation are insufficient to prove extreme hardship. Moreover, the U.S. Supreme Court held in *INS v. Jong Ha Wang*, 450 U.S. 139 (1981), that the mere showing of economic detriment to qualifying family members is insufficient to warrant a finding of extreme hardship.

An analysis under *Matter of Cervantes-Gonzalez* is appropriate. The AAO notes that extreme hardship to a qualifying relative must be established in the event that he or she accompanies the applicant or in the event that he or she remains in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant’s waiver request.

The record reflects that the applicant wed [REDACTED] a native of Fiji and naturalized U.S. citizen, on April 10, 1999. The record shows that the applicant and his spouse have two U.S. citizen children, nine-year-old [REDACTED] and eight-year-old [REDACTED]. The applicant’s spouse asserts in her September 18, 2007 letter that she and the applicant have a third child whose date of birth is September 6, 2007. However, no documentation has been furnished to establish the identity of this child.¹ Therefore, the AAO will only consider hardship to the applicant’s spouse and two older children in these proceedings.

On January 13, 2010, the AAO received letters from the applicant and his spouse. The applicant’s spouse states that she does not want to move to Fiji because her family will be deprived of educational opportunities, job opportunities and quality healthcare. She states that it will be extremely difficult for the children to adjust to another culture, language and school system. She states that the political climate has not been stable in Fiji for over two decades. She states that her children will be deprived of love and affection from their grandparents, aunts and uncles.

The applicant asserts that raising his family in Fiji is not a great option due to the deteriorating economy and unstable government. He states that his spouse’s entire family is in the United States

¹ On January 13, 2010, the AAO received a letter from the applicant, which states, “I have three children with [REDACTED] the last baby girl was born on September 6, 2007. Pre-natal and post natal records are attached. My current employment letter, letter from my uncle and wife is also attached.” However, these documents were not submitted to the AAO and are not in the record of proceedings.

and she has no immediate family or property in Fiji. He states that his wife has been residing in the United States for 22 years. He states that two of his children have been enrolled in school. He states that it would be extremely difficult for them to adjust to another culture, language and school system. He states that his children have been exposed through television, school, newspaper and friends to the American culture and have begun to think, dress and act American. He states that his family will not be able to pursue quality healthcare in Fiji. He states that his wife will be deprived of the love and affection of her parents. He states that given his spouse's strong family ties in the United States and the deteriorating political and social climate in Fiji, the waiver should be granted.

In *Salcido-Salcido v. INS*, 138 F.3d 1292, 1293 (9th Cir. 1998), the Ninth Circuit Court of Appeals, under which this case arises, held that, "the most important single hardship factor may be the separation of the alien from family living in the United States," and that, "[w]hen the BIA fails to give considerable, if not predominant, weight to the hardship that will result from family separation, it has abused its discretion." (Citations omitted). Separation of family will be given appropriate weight in the assessment of hardship factors in this case.

The applicant's spouse states in the April 7, 2006 declaration she filed with the waiver application that her entire family is in the United States and she does not have immediate family in Fiji. She states that her parents are U.S. citizens and they reside with her. She states that she and her parents depend upon each other as a family. The AAO notes that the record does not contain evidence of the applicant's spouse's family members' identities and residential addresses in the United States. However, the record does contain a letter dated December 12, 2006 from [REDACTED] principal of the applicant's sons' school, [REDACTED] [REDACTED] states, in part:

[REDACTED] started school at [REDACTED] in August of 2005 in Kindergarten. [REDACTED] is now in first grade. His brother [REDACTED] began school in August of 2006 as a Kindergarten. These boys are currently living with their grandparents and aunt who have full responsibility of their care.

The AAO finds that this document demonstrates that the applicant's children have strong family bonds with their grandparents and aunt who have taken "full responsibility" for their care. Therefore, the AAO can conclude that the applicant's children would likely suffer hardship if they were separated from their family members and relocated to Fiji.

Furthermore, the AAO finds that the record demonstrates that the suffering the applicant's children would experience due to separation from their family members would be compounded by the hardship they would suffer during their transition to residence in Fiji. The record shows that nine-year-old [REDACTED] and eight-year-old [REDACTED] have resided their entire lives in the United States. BIA and U.S. Court decisions have found extreme hardship in cases where the language capabilities of the children were not sufficient for them to have an adequate transition to daily life in the applicant's country of origin. For example, in *Matter of Kao and Lin*, 23 I&N Dec. 45, 50 (BIA 2001), the BIA concluded that the language capabilities of the respondent's 15-year-old daughter were not sufficient for her to have an adequate transition to daily life in Taiwan. The girl had lived her entire life in the United States and was completely integrated into an American life

style, and the BIA found that uprooting her at that stage in her education and her social development to survive in a Chinese-only environment would constitute extreme hardship. In *Ramos v. INS*, 695 F.2d 181, 186 (5th Cir. 1983), the circuit court stated that “imposing on grade school age citizen children, who have lived their entire lives in the United States, the alternatives of . . . separation from both parents or removal to a country of a vastly different culture where they do not speak the language,” must be considered in determining whether “extreme hardship” has been shown. In *Prapavat v. INS*, 638 F. 2nd 87, 89 (9th Cir. 1980) the Ninth Circuit found the BIA abused its discretion in concluding that extreme hardship had not been shown to the aliens' five-year-old citizen daughter, who was attending school, and would be uprooted from the country where she lived her entire life and taken to a land whose language and culture were foreign to her.

The AAO has considered the hardship factors presented in this case in the aggregate and finds that given the applicant's children's attachment to their extended family members in the United States, and the applicant's children's life-long residence in the United States, it has been established that they would suffer extreme hardship if they relocated with the applicant to Fiji.

Although hardship to the applicant's children in the event that they accompany the applicant to Fiji is material for establishing eligibility for a waiver under section 212(h) of the Act, it is not the only factor to be considered. Extreme hardship to the applicant's children and/or spouse must be established in the event that they accompany the applicant or in the event that they remain in the United States, as a qualifying relative is not required to reside outside of the United States based on the denial of the applicant's waiver request.

The applicant's spouse asserts in her April 7, 2006 declaration that her sons are of the age where they need the stability and presence of both parents. She states that it would be extremely difficult for her to work, support and raise her sons without the applicant. She states that she is being treated for a rare medical skin disorder. She states that the disorder has made her incapable of working with the public in her position as a medical assistant in the Oncology department of Kaiser. She states that she was off work in 2005 for approximately seven months, making it difficult for her to support and care for her children. She states that she has been under psychiatric care for depression and is under medication. She states that she had a suicide attempt in 2005 and was at an in-patient facility for two months. She states that the stress of being without the applicant has exacerbated her medical disorder. She states that the social ostracism within their local community has left her helpless and in despair.

The applicant's spouse asserts in the recent letter she filed with the AAO that as a single mother her earnings as a medical assistant will not be enough to provide child care for her children while employed. She states that her family is on government aid, which is also not enough to support the family. She states that she and her children miss the applicant. She states that her children are deprived of not having a father during their childhood years. She states that if the applicant's appeal is approved and he returns to the United States, “we will find a job and raise our kids the right way.”

The AAO will consider medical hardship as a factor contributing to a finding of extreme hardship; however such hardship must be documented in the record. Here, the record fails to provide any

information to corroborate the applicant's claims that she is suffering from a rare skin disorder and depression. The applicant's spouse furnished a document entitled "Visit Verification" from her employer, The Permanente Medical Group. The verification letter states that the applicant's spouse was seen at the medicine clinic on January 3, 2006 and she has been unable to attend work or school from January 3, 2006 to January 4, 2006. It states that she can return to work without restrictions on January 4, 2006. There is no information on the condition that resulted in the applicant's spouse's absence. The visit verification letter only states, "no diagnosis found." The applicant's spouse furnished a second letter from Kaiser Permanente regarding her total and permanent disability benefits. The letter dated October 25, 2005 states, "The HR Service Center has been notified that you are unable to work due to a disability. It appears that your disability may extend beyond the required six month waiting period, which qualifies you to apply for Total and Permanent Disability (T&PD) benefits through MetLife." However, the applicant's spouse failed to provide any evidence that she applied for disability benefits. There is no evidence in the record related to the diagnosis and prognosis of her medical condition.

Furthermore, there is nothing in the record related to her diagnosis and treatment for depression. The applicant's spouse submitted a document dated August 24, 2005, which is entitled "Authorization for Medical Care by a Non-Kaiser Permanente Provider," which states that Kaiser Permanente approved the applicant's request for medical care from the Alameda County Health Care Jg Psychiatric Pavilion. The applicant's spouse also submitted a document dated August 30, 2005 from the Alta Bates Summit Medical Center. This document states that pursuant to California law she is prohibited from owning a firearm for a period of five years from the admission date to the mental health facility. Although these documents are evidence that the applicant's spouse received mental health treatment, they do not demonstrate that her treatment was for depression. The applicant's spouse has not furnished a psychological evaluation demonstrating the diagnosis of her depression, the prognosis of the condition, and any long and short term treatment plans. There is nothing in the file that shows her mental health condition was caused or exacerbated by her separation from the applicant. Therefore, the AAO cannot conclude that the applicant's spouse is suffering medical hardship as a result of her separation from the applicant.

The AAO acknowledges that the applicant's spouse and children will experience emotional hardship if they remain in the United States without the applicant, but the applicant has failed to demonstrate that this hardship, when combined with other hardship factors, will be extreme. The AAO recognizes the significance of family separation as a hardship factor, but concludes that the hardship described by the applicant and his spouse, and as demonstrated by the evidence in the record, is the common result of removal or inadmissibility and does not rise to the level of extreme hardship. U.S. court decisions have repeatedly held that the common results of removal or inadmissibility are insufficient to prove extreme hardship. *See Hassan v. INS*, 927 F.2d 465, 468 (9th Cir. 1991). In addition, *Perez v. INS*, 96 F.3d 390 (9th Cir. 1996), held that the common results of deportation are insufficient to prove extreme hardship and defined extreme hardship as hardship that was unusual or beyond that which would normally be expected upon deportation.

Finally, there is no evidence that any financial hardship the applicant's spouse and children are suffering will be alleviated by the applicant's return to the United States. The record shows that the

applicant resided in the United States from his admission as a B2 visitor on November 26, 1996 until his removal to Fiji on September 15, 2003. The applicant filed an Application for Asylum and for Withholding of Deportation (Form I-589) on February 4, 1997. He received employment authorization based on his pending asylum application. However, there is no evidence in the file related to the applicant's employment and earnings when he was residing in the United States. The applicant's Biographic Information Form (Form G-325) dated August 23, 2003 provides no information on his place of employment and occupation during his residence in the United States. The record does show, however, that the applicant's spouse has maintained employment with Kaiser Permanente as a medical assistant.² The applicant's spouse's (undated) Form G-325 shows that she has been employed with Kaiser Permanente since January 2002. The applicant's spouse's tax returns show that in 2003 she earned \$32,564, in 2004 she earned \$26,696, and in 2005 she earned \$20,191. In sum, the record does not show that during the applicant's residence in the United States he contributed financially to his household. The record instead indicates that the applicant's spouse is the financial head of the household.

The applicant's spouse indicated in the recent letter she filed with the AAO that her family is receiving "government aid." The AAO cannot determine the significance of this assertion as the applicant's spouse has not further elaborated on the type of "government aid" she and children receive. Nor has she submitted evidence to demonstrate that she is receiving welfare benefits. Further, as discussed, the applicant's spouse has stated that she resides with her parents. The letter from the applicant's children's school principal states that his children are living with their grandparents and aunt "who have full responsibility of their care." There is nothing in the record to demonstrate that this living arrangement has changed. Therefore, the AAO does not find that the applicant's spouse is suffering financial hardship as a result of her separation from the applicant.

In this case, the record does not contain sufficient evidence to show that if the applicant's spouse and children remain in the United States the hardships they would face when considered in the aggregate would rise beyond the common results of removal or inadmissibility to the level of extreme hardship. The AAO therefore finds that the applicant has failed to establish eligibility for a waiver of inadmissibility under section 212(h) of the Act.

The AAO notes that even if the applicant had satisfied the requirements of section 212(h)(1)(B) of the Act, his waiver application would not be granted as the AAO finds that he is not deserving of a favorable exercise of the Secretary's discretion.

The regulation at 8 C.F.R. § 212.7(d) states in pertinent part:

Criminal grounds of inadmissibility involving dangerous or violent crimes. The Attorney General [Secretary], in general, will not favorably exercise discretion under section 212(h)(2) of the Act...in cases involving violent or dangerous crimes, except...in cases in which the alien clearly demonstrates that the denial of the

² In the recent letter the applicant's spouse filed with the AAO she indicated that she is still employed as a medical assistant.

application for adjustment of status or an immigrant visa or admission as an immigrant would result in exceptional and extremely unusual hardship.

As stated, the applicant was convicted on July 23, 2003 of willful infliction of corporal injury on his spouse, a felony, in violation of Cal. Penal Code § 273.5(a).

Cal. Penal Code § 273.5(a) (West 2003) provides:

(a) Any person who willfully inflicts upon a person who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or her child, corporal injury resulting in a traumatic condition, is guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not more than one year, or by a fine of up to six thousand dollars (\$6,000) or by both that fine and imprisonment.

From the plain language of this statute, it can be concluded that the applicant has been convicted of a violent crime pursuant to 8 C.F.R. § 212.7(d). Therefore, even if the applicant satisfied the extreme hardship requirement of section 212(h)(1)(B) of the Act, he would still be subject to the heightened hardship requirement of showing exceptional and extremely unusual hardship to warrant a favorable exercise of discretion under section 212(h)(2) of the Act.

In proceedings for application for waiver of grounds of inadmissibility under section 212(h) of the Act, the burden of establishing that the application merits approval remains entirely with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. Here, the applicant has not met that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.